

Subsequent Efforts to Strengthen the Convention

During the negotiation of the Convention, the United States sought to include coverage of bribes paid to political parties, party officials, and candidates for public office. These important channels of bribery and corruption are covered in the FCPA. They are not, however, specifically covered in the Convention.

The United States has repeatedly expressed its concern that failure to prohibit the bribery of political parties, party officials, and candidates for office may create a loophole through which bribes may be directed in the future. Although since 1977 the FCPA has prohibited the bribery of these persons and organizations and no such loophole in U.S. law has existed, our experience has shown that such bribery may be effective. In fact, the very first case brought under the FCPA involved a payment to a political party and party officials. In the fight against corruption, bribes to political parties, party officials, and candidates are no less pernicious than bribes to government officials.

The United States was not able to convince other signatories to include this broader coverage of bribery in the Convention. We did succeed, however, in getting signatories to keep this issue and certain other issues under study. In all, five issues were identified by the OECD Council in December 1997 for additional examination:

- Bribery acts in relation to foreign political parties.
- Advantages promised or given to any person in anticipation of that person becoming a foreign public official.
- Bribery of foreign public officials as a predicate offense for money laundering legislation.
- The role of foreign subsidiaries in bribery transactions.
- The role of offshore centers in bribery transactions.

Although not addressed by the OECD Council, private sector bribery and the question of whether the obligations of the Convention should be extended to include an explicit prohibition of payments to immediate family members of foreign public officials are also of interest to the United States. These issues remain under review within the U.S. government.

The United States has continued to raise its concerns about broadened coverage at OECD meetings and also with signatory governments on a bilateral basis, and has insisted that this subject remain on the OECD agenda for further discussion. However, given the lack of consensus on expanding coverage, the United States has made its highest priority encouraging all signatories to complete ratification and implementation of the existing Convention as soon as possible.

Outstanding Issues Relating to the Convention

Political Parties, Party Officials, and Candidates

Over the past year, the United States has sought to keep the issue of bribes to foreign political parties, party officials, and candidates for office on the OECD's agenda. We have, however, faced indifference and even strong resistance from many signatories. Most countries are of the view that signatories should implement the Convention as it is and monitor implementation over time to see whether changes are necessary.

Nonetheless, at the May 1999 OECD ministerial meeting, ministers did endorse further consideration of all five issues as part of the OECD's work to strengthen the fight against corruption. Since then, the U.S. delegation has regularly raised the issue of further coverage at Working Group meetings and pressed to keep this issue on the agenda. The delegation made particularly strong statements on the importance of addressing coverage of political parties, party officials, and candidates at the Working Group meetings in December 1999 and March 2000. While Working Group members have been reluctant to engage in further discussion of revising the Convention, they did accept the U.S. recommendation to include an update on issues related to bribery coverage and the other outstanding issues in the June 2000 report to the OECD ministerial meeting. Clearly, however, developing support for strengthening the Convention, particularly regarding the bribery of political parties, party officials, and candidates for public office, will require a longer-term effort as most signatories have yet to accept the need for any changes to the Convention.

Bribery as a Predicate Offense to Money Laundering

With regard to the relationship between bribery and money laundering legislation, Article 7 of the Convention requires a party that has made bribery of its own public officials a predicate offense for applying its money laundering legislation do so on the same terms for the bribery of a foreign public official. A potential problem arises in that there could be uneven application of the Convention between parties that make bribery of domestic officials a predicate offense for purposes of money laundering legislation and those that do not.

Many signatory countries, particularly the European and civil law countries, define money laundering as the concealment of proceeds from all "serious crimes," as that term is defined under their domestic legislation.

Others, like the United States, define predicate crimes in domestic legislation by cross-referencing a list of other specific offenses or statutory provisions.

How jurisdictions define "serious" cannot be generalized. Definitions are based on individual domestic legal systems in each country (i.e., punishable by imprisonment of a certain period of time or roughly the distinction between a misdemeanor and a felony).

Thus, if all parties to the Convention would make bribery a serious offense for the purposes of domestic money laundering legislation, there would seem to be no need for going beyond the requirements in Article 7 of the Convention. Language endorsing the application of bribery as a predicate offense for money laundering was included in the G-8 conclusions at Moscow in October 1999. Since then, a consensus appears to have emerged within the entire Working Group on Bribery, including the G-8 countries, on the need to make bribery a predicate offense for money laundering legislation.

In November 1999, the Administration sent to Congress the Money Laundering Act of 2000. The proposed legislation expands the list of foreign crimes that may serve as a predicate offense for a money laundering prosecution when the proceeds of the crime are laundered in the United States. Among the crimes included in this expanded list is fraud against a foreign government. If enacted, this provision would permit the United States to prosecute, as a violation of American anti-money laundering laws, the laundering of the proceeds of the bribery of a foreign government official.

The Role of Foreign Subsidiaries

Foreign-incorporated subsidiaries are potentially subject to the law of the country in which they are incorporated and the law of any country in which they operate or in which they take any action in furtherance of an unlawful payment. Thus, as an example, a foreign-incorporated subsidiary of an American company, just like any foreign company, is subject to the FCPA if it takes any act in furtherance of the offer, promise to pay, payment, or authorization of an offer, promise, or payment of a bribe within U.S. territory. We understand that other parties to the Convention may assert a similar form of territorial jurisdiction although there are some gaps in the coverage of extraterritorial acts by corporations.

No OECD member country holds parent corporations absolutely liable for the criminal acts of their subsidiaries. In the United States and other Convention signatories that impose liability on legal persons, parent cor-

porations may be held liable only for the acts of their subsidiaries that are authorized, directed, or controlled by the parent corporation. The United States has, therefore, urged further examination of strong standards of corporate governance, business ethics, and international accounting standards to ensure that foreign subsidiaries do not use their independence to obtain business through means prohibited to their parents.

The Role of Offshore Financial Centers

On the role of offshore financial centers, there appears to be broad agreement on the need to encourage adherence to internationally accepted minimum standards in the areas of anti-money laundering, financial regulation, company law, and mutual legal assistance. These issues are not exclusive to offshore centers, nor are they restricted to the fight against bribery and corruption. The Working Group has dedicated two sessions to the issue of offshore centers to determine the significance of the problem as it relates to bribery of foreign public officials and whether there are aspects of the problem not being dealt with in other forums that might benefit from Working Group activity. This work continues.

Compliance with international norms is a focal point of the Financial Stability Forum's Working Group on Offshore Financial Centers, while the Financial Action Task Force's Ad Hoc Group on Noncooperative Countries and Territories is concentrating on the ability and willingness of jurisdictions to cooperate in the fight against money laundering. Other international forums with initiatives on related issues are the United Nations, the European Union, the Council of Europe, and the G-8. Bribery transactions frequently are carried out, at least in part, in jurisdictions that do not participate in arrangements for international cooperation. This greatly complicates multilateral efforts to promote transparency in financial and commercial transactions and greater mutual legal assistance.

Other Issues Relating to Coverage

Immediate Family Members of Foreign Public Officials

In the Working Group on Bribery, the United States has informally raised the question of whether the Convention provides adequate coverage of bribes paid to immediate family members of foreign public officials. There is general agreement that bribes paid to a government official through a family member—either at the direction of a corrupt foreign official or where there is

an understanding that the family member will pay some or all of the bribe to the official or the official will otherwise benefit—is adequately covered by the Convention. Since all bribes paid to officials through intermediaries are already covered, we thus far have found no support for expanding the Convention to provide for an explicit prohibition against bribes paid to immediate family members in the absence of the direction of a government official or absent the intent or expectation of the bribe payor that all or a part of the bribe will be paid to a government official or the official will otherwise benefit. Indeed, we do not provide in our FCPA for coverage of payments to family members apart from such cases.

In the ongoing process within the OECD of reviewing the implementation of the Convention by each party, we will continue to examine whether bribes paid to immediate family members may provide a loophole of sufficient magnitude so as to undermine effective implementation of the Convention.

Private Sector Corruption and Other Issues

The issue of private sector corruption, which goes beyond the scope of the Convention, has been addressed in two sessions of the Working Group and in informal consultations with representatives of civil society, notably the OECD Trade Union Advisory Committee (TUAC) and the Business and Industry Advisory Committee (BIAC). The Working Group concluded in July 1999 that the question of bribery within the private sector was largely undefined and unexplored, but nevertheless important. The Working Group is awaiting an International Chamber of Commerce study of bribery within the private sector that should be completed within two years. The Working Group has not addressed the question of corruption of officials for purposes other than to obtain or retain business.

The Working Group sessions with TUAC and BIAC have also dealt with the solicitation of bribes and the protection of whistle-blowers (either within government or business) who come forward to expose corruption. Discussion to date has not produced a suitable means for addressing the solicitation of bribes by government or corporate officials. Solicitation remains on the agenda of the Working Group as an area of concern and possible follow-up in the context of the 1997 OECD Council Recommendation on Combating Bribery in International Business Transactions. Whistle-blowing, however, is a subject that goes beyond the scope of bribery of foreign public officials, and thus the Working Group has deferred immediate follow-up action. The issue could be revisited in connection with the Phase II monitoring of the implementa-

tion of the Convention and in a future review of the 1997 OECD Council Recommendation.

In addition, the Working Group has been examining private sector corruption in terms of the relationship between the Convention and related OECD anti-corruption initiatives and the OECD Guidelines for Multinational Enterprises. The OECD guidelines, initially adopted in 1976, are nonbinding recommendations addressed by OECD member countries to multinational enterprises operating in their territories. The guidelines are currently undergoing review in the Committee on International Investment and Multinational Enterprises. CIME is considering the best means of reflecting in the guidelines the OECD's intensified anti-corruption activities.

In April 2000, Transparency International presented to the Working Group a major new study on accounting issues. Transparency International directed a private sector task force which collected and analyzed data to assist the Working Group in developing expertise with regard to: books and records; internal controls; and auditing practices. The study documented current practices in sixteen countries, including the ten largest exporters, and developed both general and country-specific findings. Requirements in the areas of financial transparency and accountability are important in the fight against bribery since they deter use of slush funds and help guard against coverups.

Conclusion

During the monitoring of the implementation and enforcement of the Convention, we will continue to raise the above issues with other Working Group members. We will also work closely with the private sector and nongovernmental organizations to convince the other parties to the Convention that additional prohibitions on bribe offers and payments will strengthen the Convention and advance our common goal of eliminating bribery in international business transactions. We expect that other parties will show more interest in private sector issues, such as whistle-blowing and books and records provisions, as they begin enforcing their antibribery laws under the Convention. At that point, these issues will become a more practical and less theoretical concern.